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To: District EEO Officers, Indiana Constructors Inc.
Division of Economic Opportunity

Thru: Dennis Kuchler, Chief
Division of Contracts and Construction

Thru: Martha Kenley, Chief, Director
Economic Opportunity

From: Danny Wampler
Prequalification Engineer

Re: DBE Utilization

During the past several months, INDOT has discovered problems concerning the reporting of DBE utilization. The most common problem centers around subcontracts that require the DBE subcontractor to furnish and install materials. The materials we are concerned with are reinforcing steel, concrete structural members and structural steel. The prime contractors in these instances have purchased the material, given a small markup to the DBE subcontractor, and then claimed the material cost toward their DBE goal. This practice is not allowed. In order for the prime contractor to include the installed material in the DBE goal, the DBE Subcontractor must have performed a "commercially useful function." INDOT has voiced its concerns with ICI concerning this problem. In response, the ICI membership has composed the following that explains the definition of "commercially useful function". The following is intended to be used as a guide only; the contractors involved in this program are ultimately responsible to conform to all requirements of the law.

Section 26.55 of the U.S. DOT Disadvantaged Business Enterprise (DBE) regulations requires that a DBE firm perform a "commercially useful function" on a contract in order to count the work of the DBE firm towards the contract DBE goal. Because of recent nationwide concern by both U.S. DOT and the Federal Highway Administration (FHWA) about possible cases of DBE fraud, INDOT has started to closely examine whether DBE subcontractors are, in fact, performing a commercially useful function.

This is of particular significance when the activity of a DBE that is counted towards the goal includes both work on the contract and the purchase of materials that are being installed. The situations being focused on most closely are those involving the purchase and installation of structural steel or structural concrete bridge beams or reinforcing steel. At least two contractors have been referred to the INDOT Prequalification Committee because of questions regarding whether the DBE subcontractor actually purchased the materials being installed. The contractors involved had their prequalification revoked for a period of time as a result.

The regulations state that a DBE performs a commercially useful function "when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price directly with the supplier, determining quality and quantity, ordering material, and installing (where applicable) and paying for the material itself."

The regulations further clarify that a DBE does not perform a commercially useful function "if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation." Therefore, a DBE firm is not providing a commercially useful function if the prime contractor negotiates the price of materials with the supplier but the cost of those materials is run through the DBE firm's books.

During discussions, INDOT personnel have stated that a prime contractor can provide a joint check - payable to both the subcontractor and supplier - to ensure that the supplier is paid. The key is whether the DBE actually negotiates price with the supplier, orders, and is financially responsible for, the materials.

This does not prohibit a prime contractor from ordering materials that will be installed by a DBE subcontractor as long as credit towards the DBE goal is not claimed for the cost of the materials.

Both the prime contractor and a DBE need to be sure that the dollars shown on the DBE-3 report (filed at completion of the project) is the amount the prime paid to the DBE subcontractor (or supplier) for work on which the DBE firm performed a commercially useful function.

I hope this information has been helpful. Should you have any concerns, please feel free to call Martha Kenley, Director of Economic Opportunity at 317-232-5328.

DCW/tmb